

MEMORANDUM

May 26, 2010

TO: LOWER WILLAMETTE GROUP
cc: Michael Schiewe, Joan Snyder and Krista Koehl

FROM: BARBARA D. CRAIG AND JOHN IANI

RE: Portland Harbor – Executive Summary for the Memorandum regarding recommended framework for ESA Consultation

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) waives all requirements for all federal, state or local permits for on-site actions. The remedial action must instead comply with applicable relevant and appropriate requirements (ARARs) as determined by EPA. The Endangered Species Act (ESA) has been identified as an action-specific ARAR by the Lower Willamette Group (LWG) and the Environmental Protection Agency (EPA). In contexts outside CERCLA, the ESA imposes both procedural and substantive requirements for protection of endangered and threatened species. In the context of CERCLA, due to the federal permit exemption, it is only the substantive ESA obligations that apply, ultimately as determined by EPA. It appears that EPA's common practice has been to consult informally on the ROD and to formally consult on the specific implementation of the remedial actions in conformance with the ROD. However, given the statutory and regulatory framework, EPA has some flexibility in designing and negotiating an ESA process for the Portland Harbor Cleanup.

EPA has directed the LWG to incorporate the scope and cost of ESA compliance into its presentation of alternatives in the Feasibility Study. Including this information in the Feasibility Study will allow EPA's Proposed Plan and ROD to take into consideration the scope and cost of the likely ESA terms and conditions. In order for the LWG to do this, EPA (and the LWG) must engage with NMFS at some level of consultation, and that has been proceeding on an informal basis through a series of meetings to develop draft habitat mitigation values. Significant progress has been made on the substance of the mitigation matrix, but there have not been detailed discussions on the specific consultation process to be followed or how that consultation will be memorialized.

We recommend that the LWG encourage EPA and NMFS to conduct a formal or informal consultation at this time to memorialize at a general or programmatic level those minimization and avoidance elements that will be necessary to avoid jeopardy with respect to the alternatives being evaluated in the Feasibility Study. With this input, when EPA issues its ROD for a selected Plan, EPA will be able to use NMFS input to address NMFS' concerns in a programmatic manner. This approach would ensure that EPA will consider and account for the

costs of the ESA mitigation actions, terms and conditions because EPA would be considering potential ESA mitigation actions while applying the nine criteria for Plan selection. Subsequent individual section 7(a)(2) consultations, if necessary, could be tiered to the programmatic consultation on EPA's ROD.

To facilitate this process, the LWG could prepare a draft biological assessment for EPA that describes the proposed action and evaluates the potential effects of the action on listed (and proposed) species and designated (and proposed) critical habitat. Of particular note, we do not recommend that EPA request in the context of the Portland Harbor Superfund Site that NMFS consult with it on the protectiveness of the water quality criteria being applied as screening or performance criteria. EPA as action agency is responsible for describing the proposed action in the BA. Developing a BA for the Portland Harbor is in large part a matter of packaging existing information in the ESA format. EPA and the LWG could use the BA to determine if formal or informal consultation should be conducted and to assist in engaging NMFS in a meaningful dialogue to accurately reflect the ESA terms and conditions and costs of such measures in EPA's selected Plan. 50 CFR § 402.12(k). The LWG should encourage EPA and NMFS to develop a biological opinion (or utilize the BA and a NMFS concurrence) for the ROD in a similar manner to NMFS authority under a 4(d) rule that specifies the how to avoid take of a particular species and provides an express safe harbor provision.